

**REMARKS****Status of the Claims**

Claims 1-62 are currently pending in this application. Claims 12-13, 19, 22-23, 35-43, 50 and 59-62 have been withdrawn from consideration. Claims 1-11, 14-18, 20-21, 24-34, 44-49, and 51-58 have been rejected. Claims 49-58 have been canceled. Reconsideration is respectfully requested.

**Elections/Restrictions**

The Examiner states:

Applicant's election without traverse of Invention I, Species A, claims 1-34 and 44-58 in the reply filed on 09 June 2009 is acknowledged. Claims 35-43 and 59-62 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Further, claims 12-13, 19, 22-23 and 50 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention. They are withdrawn due to the specification not disclosing the limitations of the "shim," the "overhanging tab," and "two distraction paddles" as part of the elected species. The breakdown of the claims deemed to correspond to the species listed in the "Requirement for Restriction/Election," mailed on 22 May 2009, was as thought best by the examiner. Per the restriction requirement, it is the duty of the applicant to specifically identify each claim readable on the elected species.

Applicant confirms the election.

**Drawings**

The Examiner states:

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the "angled guide feature" must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should

include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

The drawings are objected to because Figure 29 appears to have an extraneous reference number 74b. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description: 30, as disclosed on page 12, line 15; 32, as disclosed on page 12, line 22; 50, as disclosed on page 13, line 13; 414, as disclosed on page 17, line 7; 505, as disclosed on page 17, line 12; 514, as disclosed on page 17, line 14; 614, as disclosed on page 17, line 29; 752, as disclosed on page 18, line 19; and 1211, as disclosed on page 20, line 25. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective

action in. the next Office action. The objection to the drawings will not be held in abeyance.

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they include the following reference character(s) not mentioned in the description: Figure 9 -112b, 118, 122a, 143 and 152; Figure 10 -110, 112b, 122a, 143 and 152; Figure 11 -110, 112b, 122a, 143 and 152; Figure 12 - 241 and 243; Figure 13 - 222b, 241 and 242; Figure 14 - 314; Figure 15 - 314, 333c, 341 and 343; Figure 16 - 314, 333c, 341 and 343; Figure 17 - 314, 322a and 341; Figure 18 - 422, 441 and 442; Figure 19 - 422; Figure 20 - 422, 441, 442 and 443; Figure 21 - 522; Figure 22 - 522, 541, 542 and 543; Figure 23 - 522; Figure 24 - 641; Figure 25 - 641 and 643; Figure 26 - 641; Figure 27 - 712, 741 and 742; Figure 28 - 741 and 742; Figure 29 - 74b; Figure 34 - 942; Figure 35 - 942; Figure 36 - 1352; Figure 37 - 1041; Figure 39 - 1181a and 1181b; Figure 40 - 1246 and 1248; Figure 41 -1246 and 1248; Figure 42 - 1311, 1341, 1342 and 1380; and Figure 43 -1311, 1341, 1342, 1343 and 1380. Corrected drawing sheets in compliance with 37 CFR 1.121(d), or amendment to the specification to add the reference character(s) in the description in compliance with 37 CFR 1.121(b) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

In addition to Replacement Sheets containing the corrected drawing figure(s), applicant is required to submit a marked-up copy of each Replacement Sheet including annotations indicating the changes made to the previous version. The marked-up copy must be clearly labeled as "Annotated Sheets" and must be presented in the amendment or remarks section that explains the change(s) to the drawings. See 37 CFR 1.121(d)(1). Failure to timely submit the proposed drawing and marked-up copy will result in the abandonment of the application.

Applicant proposes drawing changes as specifically described in the Amendments to the Drawings section, and attached as both Annotated and Replacement Sheets for the Examiner's consideration.

Regarding the "angled guide feature," Applicant notes that this feature is shown at least in Figures 9 to 11 (and provided and discussed below) which illustrates "one embodiment of a distractor 112 that includes a paddle 122 having an angled distal end 122 b , and thus providing an angled guide surface 122 c " – this angled guide surface having an angled distal end is a preferred

embodiment of the “angled guide feature” as claimed (see claim 11, for example). Accordingly, the “angled guide feature” is illustrated in the drawings at least to the extent that the called out “angled guide surface” is a preferred embodiment of that feature.

### **Amendments to the Specification**

Applicant has amended the specification to delete reference numbers not found in the amended replacement drawings as filed herewith.

### **Rejections Under 35 USC §102**

Claims 1, 20-21, 25-28, 44, 46, 49, 52, 54-58 are rejected under 35 U.S.C. 102(b) as being anticipated by Dorchak et al. (US Publication 2001/0031968). The Examiner states:

Dorchak et al. disclose a surgical instrument system comprising a distractor (10; Figures 1-4) (i.e. means for distracting adjacent vertebrae) including a shaft (41 a) a paddle (12a), the paddle including a height ( $h_1$  or  $h_2$ ) when inserted and being located on a distal end of the shaft and having an inferior surface and a superior surface including a means for preventing migration of the distractor (28; knurled, roughened surface or teeth extending beyond the superior surface); a filler bar (41 b) extending substantially along at least one side of the shaft and paddle and slidably engageable to and removable from the distractor; an articulating implant inserter (600; Figure 23) (i.e. means for inserting an implant) including a shaft (602) (i.e. means for rotating the implant) and an articulatable implant holding element (604) located on an angled (as shown in Figure 24) distal end of the shaft, the articulatable implant holding element being operable from a proximal portion of the shaft to releasably hold an implant; and an implant (200) having a connecting element (428) that cooperates with the articulatable implant holding element to allow articulation of the implant to a desired angle upon operation of the implant holding element, domed inferior and superior surfaces and a bullet-shaped leading end (204) (bullet-shaped in at least two planes), wherein when the filler bar is engaged to the distractor, the filler bar provides rigidity and torque strength so that the distractor can be inserted between adjacent vertebrae in a first orientation and rotated to distract the adjacent vertebrae (pages 4 and 5, paragraph 0068), the distractor paddle and shaft present guide surface (26) and an angled guide surface (surface of 16) integrated with a distal portion of the paddle and accessing the surgical site through a minimally invasive port (i.e. tubes or laparoscopic instruments (pages 8 and 9, paragraph 0104)).

With regard the statement of intended use and other functional statements, such as "configured to" and "for," they do not impose

any structural limitations on the claims distinguishable over Dorchak et al. which is capable of being used as claimed if one so desires to do so. *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Furthermore, the law of anticipation does not require that the reference "teach" what the subject patent teaches, but rather it is only necessary that the claims under attack "read on" something in the reference. *Kalman v. Kimberly Clark Corp.*, 218 USPQ 781 (CCPA 1983). Furthermore, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

### **Rejections Under 35 USC §103**

Claims 2-11, 14-18, 29-34 and 51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dorchak et al. (US Publication 2001/0031968) in view of Frey et al. (US Publication 2004/0117020). The Examiner states:

Dorchak et al. disclose the claimed invention except for the distractor paddle being rotated approximately 90 degrees to a distraction orientation presenting a second height dimension being greater than the first height dimension. In the embodiment of Figures 7-9, Frey et al. teach a distractor (10) comprising a shaft (12) and a paddle (20) that includes a first height dimension when inserted in an insertion orientation (Figure 7) and a second height dimension (greater than the first) when rotated approximately 90 degrees to a distraction orientation (Figure 9) (page 5, paragraphs 0083-0085). It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. with the distractor comprising a shaft and a paddle that includes a first height dimension when inserted in an insertion orientation and a second height dimension (greater than the first) when rotated approximately 90 degrees to a distraction orientation in view of Frey et al. in order to distract to and maintain the disc space at a greater height.

Dorchak et al. in view of Frey et al disclose the claimed invention except for the filler bar being dimensioned so as not to extend beyond the superior and inferior surfaces of the paddle. It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. in view of Frey et al. with the filler bar being dimensioned so as not to extend beyond the superior and inferior surfaces of the paddle in order to allow for smooth, uninhibited movement of the filler bar with respect to the distractor, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Dorchak et al. in view of Frey et al. disclose the claimed invention except for the angled guide feature being formed from a shape memory material. It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. in view of Frey et al. with the angled guide feature being formed from a shape memory material in order for the angled guide to be capable of conforming to the shape of the item it's guiding at the same time retaining its initial shape, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416.

Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dorchak et al. (US Publication 2001/0031968). The Examiner states:

Dorchak et al. disclose the claimed invention except for the angled guide feature being formed from a shape memory material. It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. with the angled guide feature being formed from a shape memory material in order for the angled guide to be capable of conforming to the shape of the item it's guiding at the same time retaining its initial shape, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416.

Claim 45 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dorchak et al. (US Publication 2001/0031968) in view of Lin (US Publication 2003/0130667). The Examiner states:

Dorchak et al. disclose the claimed invention except for the implant connection element being internal to the implant. Lin teaches an implant (200) having an internal connecting element (216) (Figure 11). It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. with the implant having an internal connecting element in view of Lin in order to insure a stable connection between the holding element and the connecting element.

Claims 47 and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dorchak et al. (US Publication 2001/0031968) in view of Magee et al. (US Patent 5957927). The Examiner states:

Dorchak et al. disclose the claimed invention except for the articulatable implant holding element including two sliding elements having distal implant impaction faces, the implant holding element being operable from a proximal handle to provide relative sliding in a proximal-distal direction along the shaft to selectively articulate the implant to a desired angle, wherein the position of the handle acts as a visual indicator for an angle through which the implant has been rotated. Magee et al. teach a surgical instrument (10) including two sliding elements (20) having distal impaction faces (interacting with 42 and 44), the instrument being operable from a proximal handle (12) to provide relative sliding in a proximal-distal to selectively articulate a device (32) to a desired angle, wherein the position of the handle acts as a visual indicator for an angle through which the implant has been rotated (as shown in Figure 4) (Figures 1-4 and column 3, line 1 - column 4, line 42). It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. with the surgical instrument including two sliding elements having distal impaction faces, the instrument being operable from a proximal handle to provide relative sliding in a proximal-distal to selectively articulate a device to a desired angle, wherein the position of the handle acts as a visual indicator for an angle through which the implant has been rotated in view of Magee et al. in order to adjust the angular movement of the implant.

Claim 53 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dorchak et al. (US Publication 2001/0031968) in view of Trieu et al. (US Publication 2004/0117019). The Examiner states:

Dorchak et al. disclose the claimed invention except for the means for inserting including a ratchet gun. Trieu et al. teach a means for inserting including a ratcheting handle (page 12, paragraphs 00206-00206). It would have been obvious to a person having ordinary skill in that art at the time of the invention to construct the invention of Dorchak et al. with the means for inserting including a ratcheting handle in view of Trieu et al. in order to precisely control the advancement of the implant to the operative site.

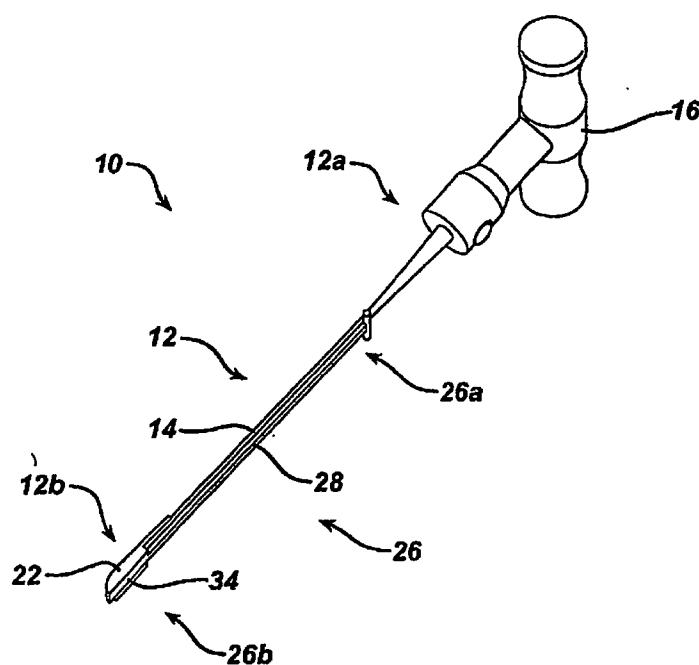
Applicant traverses these rejections based upon the comments below.

**The Invention:**

As restricted, the presently claimed invention relates to surgical instruments for distracting an intervertebral space, and in some claims also guiding an implant into that space.

An important tool in this system is the distractor assembly 10 illustrated in Figure 1, for example. The assembly 10 includes a distractor 12 and a filler bar 26. The distractor has a handle 16 on its proximal end, a distracting paddle 22 on its distal end, and a shaft 14 in between. The filler bar 26 mates with features on the distractor to provide rigidity and torque strength so that the distractor can be inserted between vertebrae 41,4 with the paddle horizontal, and then rotated approximately 90 degrees to distract the vertebrae using superior and inferior surfaces 22c, 22d of the paddle.

**FIG. 1**

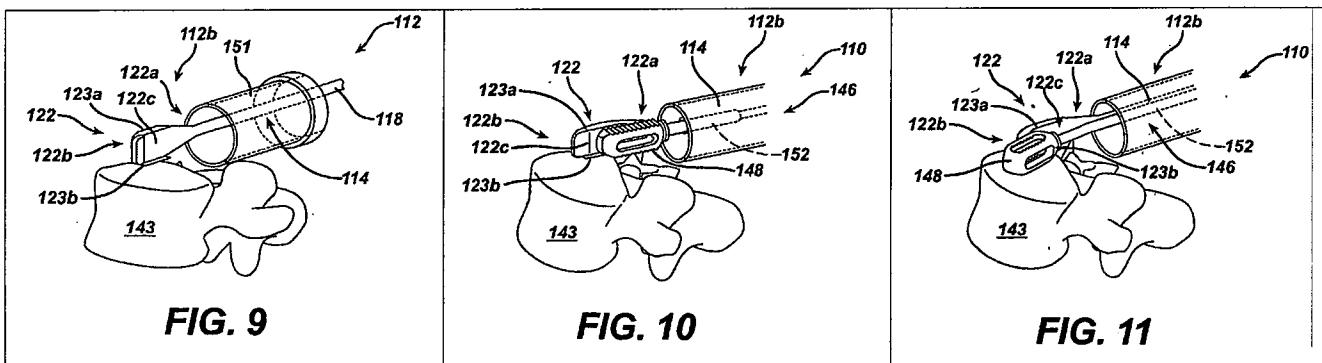


Following distraction, the filler bar 26 can be removed from the distractor 12 to increase the amount of space available, as well as to increase the surgeon's visibility (the distractor 12 with the filler bar 26 removed is illustrated in Figure 2). In addition, an implant inserter can mate to the distractor using the same features that the now removed filler bar had mated to.

Regarding the angled guide surface 122c, the application provides:

FIGS. 9 to 11 illustrate one embodiment of a distractor 112 that includes a paddle 122 having an angled distal end 122 b , and thus providing an angled guide surface 122 c . Many times,

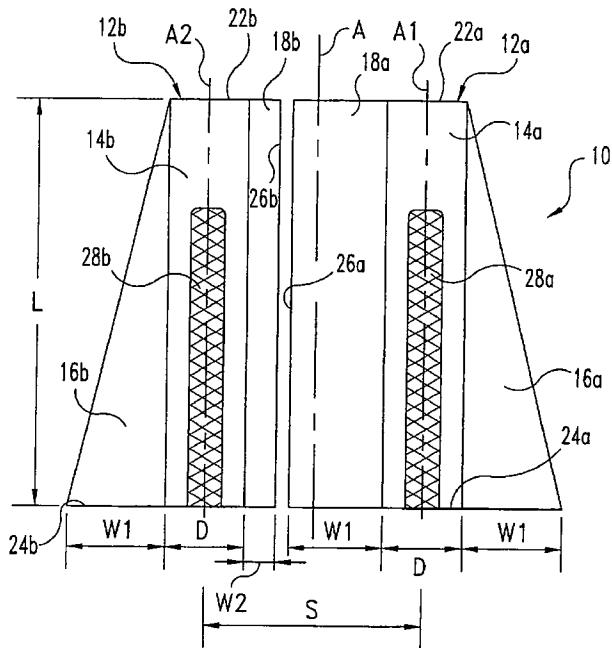
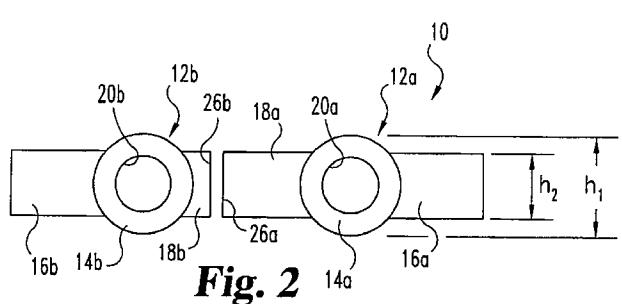
an implant is designed for placement at a certain angle of trajectory between the adjacent vertebrae and/or a surgeon chooses a particular angle of placement in order to achieve desired fusion characteristics. Minimally invasive approaches to the disk space provide well documented advantages, however, establishing a minimally invasive access portal while sparing sensitive nerve tissues from contact and possible damage requires approach angles to the disk space that may not match the desired angle of placement of the implant. For example, a typical TLIF approach may take a 35° angle (plus or minus depending on the anatomy of a particular patient) while the desired angle for placement of the implant may be 45°. Providing an angled distal end 122 b on the distractor paddle 122 allows the surgeon to carefully guide the implant during insertion to the desired angle with a reduced chance of contacting sensitive nerve tissue. While the distal end 122 b of the paddle 122 can have a variety of angles as desired by the surgeon, in the illustrated embodiment, the distal end 122 b of the paddle 122 has an angle of about 20°.



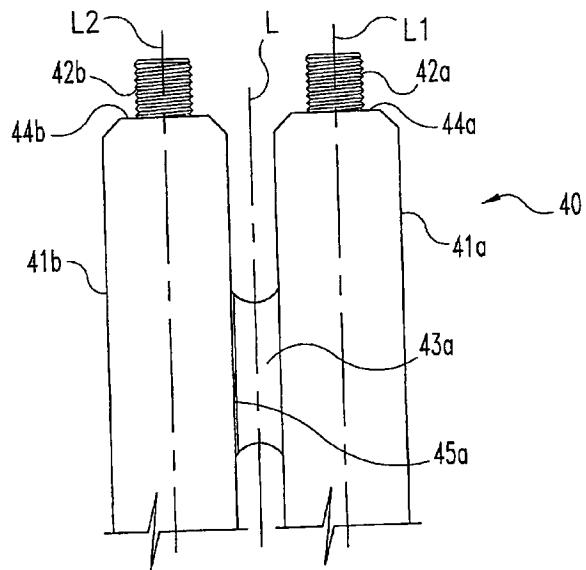
#### The Dorchak Reference:

The Examiner relies on Dorchak (US 2001/0031968) as a reference for anticipation, and also as a primary reference for obviousness, for all of the claims. Dorchak provides “a distractor assembly including a first and a second distractor configured to be inserted in side-by-side relation in the disc space.” [Abstract.] Figures 1 and 2 below show top and proximal views (the portion the surgeon would see during insertion into the patient), respectively, of first and second distractors 12a and 12b. Each of these distractors includes a guide surface (26a and 26b) that ***abut each other***.

[Para. 0066.]

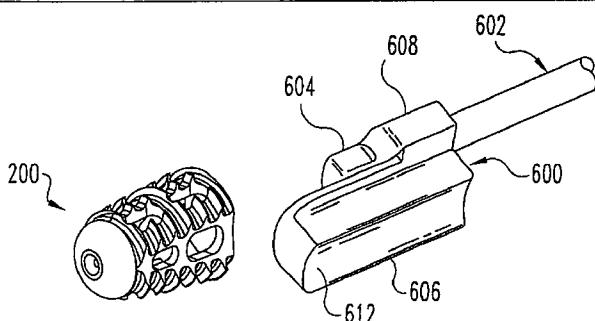
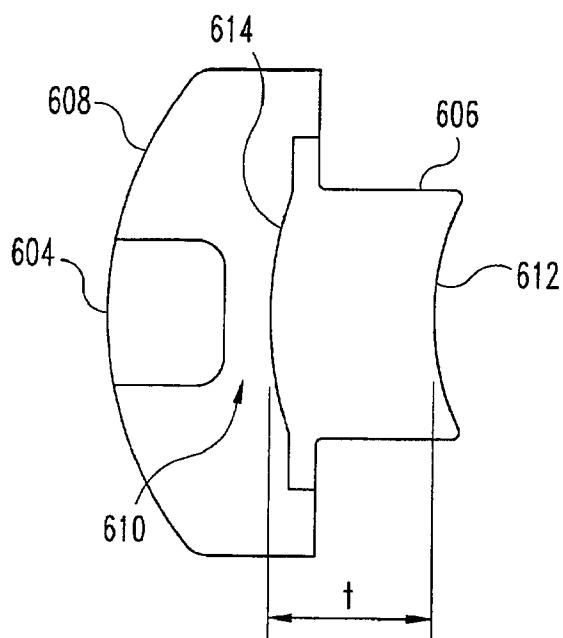
**Fig. 1****Fig. 2**

In use, each distractor 12a, 12b is connected with a corresponding connecting portion 42a, 42b. These connecting portions, illustrated in Figure 3, include shafts 41a and 41b that are screwed into threaded holes 20a, 20b in the distractors. The shafts can include a cam 43a to provide ***an abutting relationship between the shafts.*** The distractors can then be simultaneously driven into the disc space using “hammering techniques applied to the proximal end of the shafts 41a and 41b as is known in the art.” [Para. 0068.]



**Fig. 3**

The Examiner also discusses an “articulating implant inserter (600; Fig. 23). Applicant provides that embodiment and its description below:

**Fig. 23****Fig. 24**

[0103] Referring now to FIGS. 23 and 24, there is illustrated a spacer 600 engagable to a spacer insertion shaft 602. Spacer 600 is connectable to a fusion cage, such as the illustrated fusion cage 200, in order to guide and maintain lateral spacing of a second fusion cage (not shown) during insertion of the second cage into the disc space. Spacer 600 includes a cage connector 604 that extends into the hollow interior of cage 200. Preferably, connector 604 has a cross-section shape that fits within the trailing end wall opening of cage 200 such that spacer 600 will be non-rotatably secured to cage 200. Extending proximally from connector 604 is a proximal end portion 608 that includes a proximal end wall with a threaded opening (not shown) to engage spacer 600 to shaft 602. Extending from the medial side of proximal end portion 608 is a spacing member 606 that is separated from connector 604 by gap 610. Gap 610 is sized such that a medial sidewall of cage 200 can fit therein when spacer 600 is connected to the inserted cage 200 with connector 604 in the interior of the cage and spacing member 606 positioned along the sidewall of cage 200. Spacing member 606 has a thickness  $t$  that corresponds to the desired spacing between the inserted fusion cages. Spacing member 606 has a concave guide surface 612 along its medial side to guide threaded insertion of the second cage. Spacing member 606 and guide surface 612 preferably extend to the trailing end wall of proximal end portion 608 and outside the disc space to support and guide the shaft of the implant insertion device. Spacing member 606 also includes a convex lateral sidewall that conforms with the concave sidewall of cage 200 to provide a secure and snug fit between cage 200 and spacer device 600. After the second cage is inserted into the disc space, spacer 600 is removed from first cage 200.

This device appears to have no articulating elements or parts and none is described. Perhaps the Examiner means that the entire device can be articulated by a surgeon.

*Response to Rejection of Claims 1-19:*

Of these claims, claim 1 is independent (and is rejected as anticipated by Dorchak), while claims 12, 13, and 19 have been withdrawn, and the remainder are rejected as obvious over Dorchak.

Independent claim 1 recites a distractor, with a shaft and a distal paddle, and a filler bar that is shaped to removably engage the shaft and paddle to provide torque strength so that the distractor can be inserted between adjacent vertebrae and rotate to distract the vertebrae. Dorchak does not have such a filler bar. Dorchak has two distractors, each with a shaft, and each abutting the other, that are driven in laterally with a hammer to distract the vertebrae.

The Examiner asserts that one of the two shafts of Dorchak (shaft 41b) is the filler bar. But even if this shaft could be said to releasably engage the paddle and shaft of a distractor (it engages distractor 12b and abuts shaft 41a), it does not engage these two elements so as to provide torque strength for rotating the tool to distract. When shaft 41b is threaded into distractor 12b, the two distractors are placed in an abutting relationship and hammered in to distract. They cannot be rotated as they merely abut each other – one cannot provide torque strength for the other because they merely abut, a person of ordinary skill could not rotate the distractor assembly of Dorchak – only its separate parts. Even there, there would be some concern that rotating would disengage the screw threads.

Dorchak does not provide a filler bar having the recited features and so cannot anticipate claim 1.

Turning to claims 2 to 11 and 14 to 18, these claims are rejected as being obvious over Dorchak combined with Frey. Frey shows a rotating distractor – but it has no filler bar. As such, Dorchak cannot fill in the missing teachings in Dorchak with regard to the filler bar. In addition, the rotating aspects of Frey cannot be incorporated into Dorchak as they would render Dorchak inoperable – Dorchak cannot be rotated as it consists of two separate elements, the two abutting parts would simply come apart.

Turning to claim 4 in particular, the claim recites that the filler bar is dimensioned so as not to extend beyond the superior and inferior surfaces of the paddle. There is no filler bar that engages a paddle in either reference or in their combination – accordingly, the size and shape of the distal portion of the filler bar cannot be taught or suggested and claim 4 is separately patentable.

Turning to claim 5, the filler bar is recited to be slidably engageable to and removable from the distractor along a longitudinal axis of the distractor. Again, there is no filler bar disclosed in either reference or their combination that meets these features, and claim 5 is separately patentable.

Turning to claim 10, the distractor paddle comprises an angled guide feature that is configured to guide an implant through a partial rotation to a desired angle. The tissue contacting surface of bodies 16 of the distractor are cited by the Examiner for this teaching – but these features are merely hammered into tissue between the vertebrae and must be removed to allow the implant to be inserted – it is impossible for these surfaces to act as any kind of a guide for rotating the implant. This distinction is made more clear in claim 11 where the angled guide feature includes “an *angled guide surface integral with a distal portion of the paddle.*” The structure and operation of this angled guide surface is illustrated with respect to Figures 9 to 11 of the application reproduced above. Neither reference, nor their combination, teaches or suggests these features as neither includes such a feature and neither uses the distractor as a guide for rotating the implant. Claims 10 and 11 are thus separately patentable above and beyond claims 1 and 2.

Claims 15 and 16 depend from claim 10. Claim 10 recites that the distractor paddle and shaft present a guide surface for guiding the placement of an implant when the distractor is in the distraction orientation, and the distractor paddle further comprises an angled guide feature that is configured to guide an implant through a partial rotation to a desired angle.” Claim 15 then further recites an implant inserter having an angled distal end, with the angle corresponding approximately to the angle provided on the angled guide feature of the distractor paddle. The office action never addresses the issue of correspondence between the angling of the implant inserter and the guide surface on the distractor because none of the art uses the distractor to guide the implant and so there would be no reason in the art to have them correspond. The Examiner points to implant inserter 600

in Figure 23 of Dorchak – and this inserter is plainly not angled to correspond to the angle in the guide surface of the distractor, nor would it be as instruments are never used in that manner.

Claim 16 likewise depends from claim 10 and recites an implant inserter having an articulating implant holder operable to rotate the implant. The Examiner asserts that Dorchak teaches an implant inserter having such an articulating implant holder – but implant inserter 600 does not rotate the implant at all – it merely inserts an implant straight in next to another implant. There is no articulating holder on the implant that is operable to rotate it (and in fact, the implant of Dorchak is not rotated).

Accordingly, claims 15 and 16 are further patentable beyond claims 1, 2 and 10.

*Response to Rejection of Claims 20-34:*

Of these claims, only claim 20 is independent. Claims 20-21 and 25-28 have been rejected as anticipated by Dorchak, while claims 22, and 23 have been withdrawn, and the remainder are rejected as obvious over Dorchak.

Claim 20 recites a distractor having “an angled guide feature that is configured to guide an implant through a partial rotation to a desired angle.” This claim is patentable over Dorchak for reasons substantially the same as stated for claim 10 above. Similarly, claim 21 where the angled guide feature includes “an ***angled guide surface integral with a distal portion of the paddle,***” is further patentable over Dorchak for the reasons stated for claim 11 above.

Claims 25 and 26 (which recite an angled implant inserter) are further patentable over Dorchak for the reasons stated above regarding claims 15 and 16.

Claim 29 (which recites features of the distractor which make it rotatable) is further patentable over Dorchak and Frey for the same reasons stated for claim 2 above. Claim 34, which depends from claim 29 and recites the filler bar and its features, is further patentable over Dorchak and Frey for the reasons stated for claim 1 above.

*Response to Rejection of Claims 44-48:*

Of these claims, only claim 44 is independent. Claims 44 and 46 have been rejected as anticipated by Dorchak, while claim 45 is rejected as obvious over Dorchak and Lin and claims 47 and 48 have been rejected over Dorchak and Magee.

Claim 44 recites an articulating implant inserter having an articulatable implant holding element located on a distal end of the shaft. The articulatable holder on the distal end of the shaft is operable from the proximal portion of the shaft to articulate the implant to a desired angle. The implant is also recited. This claim is more specific than the features recited in claim 16 above and is not anticipated for at least those reasons. The same is true for claim 46. As Magee does not fill in this missing teaching, the same rationale supports the non-obviousness of claims 45 and 47-48.

**CONCLUSION**

If the Examiner believes that an interview would facilitate the resolution of any outstanding issues, he is kindly requested to contact the undersigned.

In the event that a petition for an extension of time is required to be submitted at this time, Applicant hereby petitions under 37 CFR 1.136(a) for an extension of time for as many months as are required to ensure that the above-identified application does not become abandoned.

The Director is hereby authorized to charge any deficiency in the fees filed, asserted to be filed or which was required to be filed herewith (or with any paper hereafter filed in this application by this firm) to our Deposit Account No. 141449, under Order No. 101896-474.

Dated: January 13, 2010

Respectfully submitted,

By   
Ronald E. Cahill  
Registration No.: 38,403  
NUTTER MCCLENNEN & FISH LLP  
Seaport West  
155 Seaport Boulevard  
Boston, Massachusetts 02210-2604  
(617) 439-2782  
(617) 310-9782 (Fax)  
Attorney for Applicant

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